REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APP.15 OF 2017

(FORMERLY NAIROBI ELC.35 OF 2014)

HANNIEL GICHINA MWANGI.......................................APPELLANT

-VERSUS-

JOE MWANIKI MWANGI...1st RESPONDENT

JANE WANGARI MWANGI...................................2nd RESPONDENT

EMMAH KABURA MWANGI..................................3rd RESPONDENT

JUDGEMENT

(Being an Appeal from the Judgement and Decree of Hon. J. W. Onchuru, PM delivered at Chief Magistrate's Court in Thika in Civil Suit No.1187 of 2010 and dated 26th November 2014)

The Respondents herein had filed ***Civil Suit No.1187 of 2010,*** in the ***Chief Magistrate's Court at Thika,*** against the Appellant(Defendant therein). The Respondents has sought for the following orders against the Appellant(Defendant therein).

> ***a. An order that the Defendant do transfer to the Plaintiffs' namely 1st Plaintiff – 2.1 acres, 2nd Plaintiff- 2.5 acres, 3rd Plaintiff- 2.5 acres and ¼ of an acre out of LR.No.Loc.16/Kigoro/491 to be reserved as cementary for members of the family.***
>
> ***b. Costs of the suit.***
>
> ***c. Any other relief the court may deem just.***

The Plaintiffs therein had alleged that though the Defendant was the registered owner of ***LR.No.Loc.16/Kigoro/491***, the said land was a family land as it was initially registered in the name of their mother ***Rahab Wanjiku,*** to hold it in trust for the family. However, the (appellant) Defendant transferred the same into his name in ***1972,*** without the consent of the other family members and thus he is still holding it in trust for the family and should be ordered to transfer as stated in the said Plaint.

The Defendant (appellant) filed his Defence and stated that though the said parcel of land was initially registered in the name of their mother ***Rahab Wanjiku***, she later gifted it to the Defendant in ***1970***. He also averred that the said land was not held in trust for his siblings as the allocation and subdivision was done in ***1962,*** and all beneficiaries had been allocated their respective parcels of land. The Defendant had also averred that the orders sought by the Plaintiffs(Respondents herein) would involve cancellation of an existing title document which were registered in ***1970*** and ***1975,*** and the Court lacked jurisdiction to grant such orders. It was also the Defendant's (Appellant's) contention that since the registration of the suit property was done in ***1970***, the Plaintiffs(Respondents) action against the defendant was time barred. Further that the Plaintiffs' issues had been raised in a ***Judicial Review Appl.No.971 of 2007,*** which was determined on ***13th May 2010,*** and therefore the Plaintiffs' action was *resjudicata*. The Appellant(Defendant therein) had prayed for the dismissal of the Plaintiffs suit with costs.

The matter was heard before ***Hon. J. W. Onchuru, Ag. PM,*** on various dates and the parties therein gave evidence and were cross-examined by their respective Counsels. The trial Magistrate thereafter gave his determination on ***26th November 2014*** and held that:-

> ***"I do find that the Defendant took an overdue advantage of the Plaintiffs by taking a lion's share of parcel No.491 which measures 23.7 acres while the 2nd and 3rd Plaintiffs who were unmarried did not receive any portion of their parents land".***

The trial Magistrate further concluded that:-

> "***Having considered the entire evidence and submissions herein, I do find that the Plaintiffs have on a balance of probability proved that they are entitled to the reliefs sought and do hereby enter Judgement for the Plaintiffs against the Defendant as per the Plaint dated 17th November 2010. The Plaintiffs will also get costs of this suit***".

The Appellant herein was aggrieved by the above determination and sought to challenge it through the ***Memorandum of Appeal*** filed on ***9th December 2014***, and listed various grounds. These grounds are:-

1. The learned Magistrate erred in law and fact in failing to appreciate that he did not have the competent jurisdiction to entertain this suit.

2. The learned Magistrate erred in law and fact in failing to appreciate that he did not have pecuniary jurisdiction to hear the said suit.

3. The learned Magistrate erred in law and fact by failing to determine whether the Defendant held the suit land in trust of the Plaintiffs.

4. The learned Magistrate erred in law and fact by failing to appreciate the principles of land registration.

5. The learned Magistrate erred in fact by stating that the Defendant took advantage of his position at Muranga County Council to unlawfully register the suit in his name.

6. The learned Magistrate erred in fact by stating that the Defendant took advantage of the ailing condition of his mother and registered the suit land to his name.

7. The learned Magistrate erred in law by failing to appreciate that the said suit was time barred.

8. The learned Magistrate erred in law and fact by totally disregarding the Defendants evidence.

9. The learned Magistrate erred in law and fact in entering judgement in favour of the Plaintiffs against the Defendant inspite the Plaintiff's miserable failure to establish their case on a balance of probability.

10. The learned Magistrate erred in law and fact by failing to appreciate as follows:-

1. That the evidence adduced in support of the Plaintiffs case was incongruous with the pleadings, composes of hear says tendered by incompetent witnesses, contradictory and discreditable.

11) That the Plaintiffs pleadings and the evidence tendered in support thereof was incapable of sustaining any award.

12) The learned Magistrate erred in fact by stating that the original owner had 183 acres instead of 198 acres.

13) The learned Magistrate erred in law and fact by stating the Defendant took an overdue advantage of the Plaintiffs by taking a lions share of the suit land.

The Appeal was opposed by the Respondents and by consent of the parties recorded on ***27th March 2015***, they agreed to maintain the *status quo* in respect to the suit property ***LR.No.Loc.16/Kigoro/491,*** until the final determination of this Appeal.

The Appeal was canvassed by way of written submissi***ons. The Appellant*** through the ***Law Firm of Kamere & Co. Advocates***, filed the written submissions on ***15th September 2017,*** and framed five questions for determination. These questions are:-

i. Was the suit land held in trust by the Defendant for the Plaintiffs?

ii. Who is the rightful owner of all the suit land and did the Court appreciate the principles of Land Registration in determining ownership of the suit land?.

iii. Was there fraud in registering the land in the name of the Appellant and was it proved as per the legal requirement.

iv. Was the suit time barred.

v. Did the court have competent jurisdiction to entertain the suit?

The Appellant relied on various provisions of law and decided cases. The Appellant relied on ***Section 126(1)*** of the ***Registered Land Act*** (now repealed) which provides that:-

"...A person acquiring land, a lease or a charge, in a fiduciary capacity may be described by that capacity in the instrument of acquisition and if so described, shall be registered with the addition of the words 'as trustees' but the Registrar shall not enter particulars of any trust in the Register".

The Appellant basing his argument on the above provision of law submitted that there was no ***trust*** created on the title held by him because he was registered in the instrument of acquisition as the sole owner but not trustee.

He further submitted that he acquired this property as a gift from his mother, ***Rahab Wanjiku,*** and the Green Card shows the same. He submitted that the land was lawfully transferred to him and was registered in his name as the sole owner.

On whether he fraudulently transferred the land to his name, he relied on ***Section 107 of the Evidence Act*** which provides that ***he who alleges must prove***. He also relied on the case of ***Evans Otieno Nyakwana..Vs..***

Cleophas Bwana Ongaro (2015) eKLR, where the Court held that:-

"In this case, it is the Respondent who filed the Defence and Counter-claim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay on the Respondent".

On whether the trial Magistrate had jurisdiction the Appellant relied on the case of ***Kibwana Ali Karisa & Ano...Vs...Said Hamisi Mohamed & 3 Others (2015) eKLR***, where the Court held that:-

"...The jurisdiction of the Subordinate Courts in relation to disputes relating to land registered under the repealed Registered Land Act pursuant to Section 159 is land whose value does not exceed Kshs.500,000/=. Once the value of the land registered under Registered Land Act (repealed) exceeds Kshs.500,000/=, the Magistrate's Courts would have no jurisdiction to deal with any Civil suit relating to the title to or the possession of land or to the title to a lease or charge registered under the Act notwithstanding the provisions of the Magistrate's Court Act, Section 13(1) of the Environment and Land Court Act and the practice directions of the Chief Justice".

It was further submitted that since ***LR.No.Loc.16/Kigoro/491,*** was registered under Cap 300, Registered Land Act (now repealed), in ***1970,*** it fell under the purview of the above stated Judgement.

On whether the issue of jurisdiction was raised, he relied on the case of ***Alvin Kamande Njenga...Vs...Gacheru (2016) eKLR***, where the Court stated:-

"Even where the jurisdiction is not raised that does not necessarily confer jurisdiction on the court if it has none. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises".

The Appellant submitted that the issue of jurisdiction was raised in his Defence. Further that by the trial court lacking jurisdiction, it's proceedings and orders/judgements are null and void and of no legal effect and that the same ought to be set aside by this Court with costs to the Appellant.

It was Appellant's further submission that the trial Court erred both in fact and law in allowing the Plaintiff's(Respondent's) suit and holding that the Defendant(Appellant) took an overdue advantage of the Plaintiffs(Respondents) by taking a lion's share of ***23.7 acres*** from ***LR.No. Loc.6/Kigoro/491***. The Appellant urged the Court to allow the Appeal.

The Respondents also filed their written submissions through the ***Law Firm of Karuga Wandai & Co. Advocates,*** and submitted that the issue of jurisdiction has been raised in the Appeal. Further that the Appellant had also raised it in its Defence but when the matter commenced hearing on ***6th August 2014***, the Appellant did not raise the said issue of jurisdiction and the case proceeded for hearing without any objection.

On the jurisdiction of the Court, it was the Respondents submissions that the Appellant cannot raise the issue of jurisdiction now because it did not become part of the proceedings and judgement in the lower Court and therefore the ground of appeal on jurisdiction is an afterthought. Further that if the Appellant had really thought that the court had no pecuniary jurisdiction, he would have stated the value of land claimed. They relied on ***Section 16 of the Civil Procedure Act*** which provides that:-

"No objection to the place of suing shall be allowed in the appeal unless such objection was taken in court of the first instance and there has been subsequent failure of justice".

It was further submitted that there was no failure of justice because the trial Magistrate substantially decided the case on merit and his Judgement is sound and fair.

It was the Respondents submissions that this suit was filed in court for the purpose of equalization as the Defendant(Appellant) got a lion's share of their mother's land ***LR.No.Loc.16/Kigoro/491.***It was further submitted that this parcel of land ***No.Loc.16/Kigoro/491,*** is a family land which belonged to their mother and that when the land was allegedly transferred to the Defendant(Appellant herein) he never informed any member of the family that the mother was to give him the land alone in exclusion of all other children and he did not produce any

witness or agreement to prove that he was really given the land. Therefore, it was the Respondents' submissions that the Appellant should be ordered to distribute the land as per the trial Magistrate's Judgement as it would be unfair for Appellant to dislocate the 2nd and 3rd Plaintiffs (Respondents) from their ancestral land. They urged the Court to be guided by ***Article 159 of the Constitution of Kenya 2010*** which provides that:-

> ***"Justice will be administered without undue regard to procedural technicalities".***

Therefore, the Court should do substantial justice and decide the case with fairness and justice and should not be prevented to do so by procedural technicalities as the procedure only provides for a path to justice but it is not the root of justice.

The Respondents finally submitted that the trial Magistrate arrived at the right decision in granting the prayers as prayed in the Plaint and therefore this appeal should be dismissed with costs to the Respondents.

The above being the pleadings and submissions before the court, this Court will take into account that it is enjoined to reconsider the evidence,re-evaluate it and draw its own conclusion. The Court will also caution itself that it neither saw nor heard the witnesses and must therefore give allowance for it. However, the findings of the trial court must be given due deference unless they fall foul of proper evaluation of the evidence on record or that the trial Magistrate acted on wrong principles in arriving at his findings. (***See the case of Selle...Vs...Associated Motor Boat Co.(1968)EA 123. Further in the case of Kenya Ports Authority...Vs...Kriston (Kenya) Ltd 2009 2EA 212***, where the Court of Appeal held interalia that:-

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not delt with by the parties in evidence".***

This Court have now considered the grounds of appeal, the submissions by the respective Counsels, the Judgement of the trial court as well as the applicable law and the Court finds that the issues for determination are as they have been framed by the Appellant.

There is no doubt that the Respondents (Plaintiffs ***in Civil Case No.1187 of 2010)*** filed a case against the Appellant (Defendant then) who is their elder brother and claimed that he should give them certain portions of land from ***LR.No.Loc.16/Kigoro/491,*** which is now registered in his name.

The Respondents had also alleged that the Appellant had caused the said parcel of land to be registered fraudulently to his name. Though they particularized the stated fraud, they (or Respondents) did not strictly prove the said fraud. It is trite that fraud is a serious allegation which should not be made lightly. See the case of ***Urmilla W/o Mohandra Shah...Vs.... Barclays Bank International Ltd & Ano. 1979 KLR 76***, where the Court held that:-

> ***"Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probability is required".***

This Court has considered the particulars of fraud and breach of trust as enumerated by the Respondents (Plaintiffs) in their Plaint and the Court finds that they had a duty to prove the said allegations on the required standard as they are the ones who had alleged. See the case of ***Jennifer Nyambura Kamau...Vs...Humphrey Mbaka Nandi(2013) eKLR***, where the Court held that:-

> ***"We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove...... Section 107 of the Evidence Act provides that 'whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he must prove that those facts exist'. Section 109 stipulates that the burden of proof as to any particular facts lies on the person who wishes the court to believe its existence........the Appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side***".

Therefore, the Respondents herein are the ones who had alleged, they therefore had a duty to prove. The trial Magistrate arrived at a finding that the Appellant herein took an undue advantage of the Plaintiffs by taking a lion's share of the suit property. The Plaintiffs (Respondents) had contended the Appellant (Defendant) had taken advantage of his position as a senior officer at Muranga County Council and also taken advantage of their mother's ill health to have the suit property ***LR.No.Loc.16/Kigoro/491,*** irregularly registered to his name at the expense of the Plaintiffs (Respondents). For the trial Court to arrive at the above findings, this court finds that the onus was on the Plaintiffs (Respondents) to provide such evidence and this Court will analyse the evidence adduced before the trial Magistrate to determine whether his finding was correctly or wrongly arrived at. This Court will analyse the adduced evidence through determination of the identified issues.

i. Was the suit land held in trust by the Defendant for the Plaintiffs.

The Plaintiffs (Respondents) had in their evidence stated that the suit land was initially owned by their father ***Mwangi Gichine,*** who died intestate in ***1958,*** and left behind three wives and children. The Plaintiffs had also testified that their father's land which was about 183 acres was shared equally among the three households. It was also the evidence of the Plaintiffs that they are all siblings of the same mother ***Rahab Wanjiku,*** and the Appellant was their elder brother. They further stated that when their father died, their household got ***61 acres*** out their father's parcel of land. Subsequently demarcation was done in ***1962,*** and since the Defendant (Appellant) was the only mature one among the children of ***Rahab Wanjiku***, he was registered as the proprietor of ***LR.No.Loc.16/Kigoro/389,*** made of ***35 acres*** and ***LR.No.Loc.16/Kogoro 496,*** made of ***2.4 acres*** to hold in trust for the family of ***Rahab Wanjiku***. Further that their mother ***Rahab Wanjiku*** was registered as proprietor of ***LR.No.oc.16/Kogoro/491,*** made of ***23.7 acres*** as a life interest.

However, in ***1970***, the Appellant took advantage of the fact that Plaintiffs were still in school and their mother's illness of memory loss to illegally transfer ***LR.No.Loc.16/Kigoro/491*** (suit land) into his name. Further that ***LR.No.Loc.16/Kigoro/389,*** was subdivided in ***1972*** and 1st Plaintiff was given ***16.4 acres*** in the resultant subdivision which was now known as ***LR.No.Loc.16/Kigoro/544***. The 1st Plaintiff testified that this land was barren and wasteland with earthquakes slides and he later disposed it off with the help of the Defendant (Appellant). The other resultant portion ***LR.No.Loc.16/Kigoro/543*** made of ***18.5 acres*** was given

to their other brother ***Joseph Kamau Mwangi*** who is not a party to this suit. However, their sisters 2nd and 3rd Plaintiffs (Respondents) were not given any share of their parents land and that is why they filed the suit to claim their rightful shares of ***2.5 acres*** each from the suit land. The 1st Plaintiff also stated that the got less land than his other brother ***2.1 acres*** and that is what he is claiming from the Defendant(Appellant herein) from the suit land.

The Defendant (Appellant) stated in his evidence that he indeed had the land parcel ***No.Loc.16/Kigoro/389,*** registered in his name at the time of demarcation but in ***1972***, the said land was subdivided and shared between his two brothers as stated by the Plaintiffs. He further stated that their mother voluntarily gave him her parcel of land ***LR.No.Loc.16/Kigoro/491,*** (suit Land) as a gift and none of his siblings complained then. He alleged that the said parcel of land was a gift *intervivo* and it was rightfully registered in his name. He denied that he took advantage of their mother's illness and that he held the land in trust for his siblings.

This parcel of land is indeed registered in the name of the Appellant herein which was done in ***1970***. The parcel of land is registered under the ***Registered Land Act Cap 300***. In the said Act, ***Section 126*** provides that:-

> ***"A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity of acquisition and if so described shall be registered with the addition words as 'trustee' but the Registrar shall not enter particulars of any trust in the register"***.

However, in this instant certificate of title held by the Appellant, the word trustee was not added and the Court assumes that the Plaintiffs (Respondents) were referring to customary trust.

Black Law Dictionary Ninth Edition describes '**Trust'** as

> ***"The right enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one another (the trustee at the request of another for the benefit of a third party".***

This Court has considered the green card for ***LR.NO.Loc.16/Kigoro/491,*** and it is very clear that the parcel of land was initially registered in the name of ***Rahab Wanjiku,*** though without any indication that she was holding it in trust for the family. Later on ***12th May 1970***, the said parcel of land was registered in the name of the Appellant and the consideration was '***gift'***. If the said ***Rahab Wanjiku*** would have wished to transfer the land to the Appellant to hold it in trust for the other siblings, the same would have been indicated in the green card. In the said green card, the Appellant is registered in the said instrument as the sole owner. There was no evidence of trusteeship availed by the Respondents herein. Once the Appellant obtained the said registration in ***1970***, then he became the absolute proprietor as provided by ***Section 27 of Cap 300 (Registered Land Act, now repealed)***, which provides:-

> ***"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".***

Therefore, the Appellant herein upon being gifted the suit land by his mother in ***1970***, became the absolute and indefeasible owner of the suit land and his right shall not be liable to be defeated as provided by ***Section 28*** of the said Act which provides:-

> ***"The right of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...".***

The Respondents had alleged in their evidence at the trial court that the Defendant (Appellant) took advantage of their mother's illness and transferred the suit land to his name. No evidence of such illness was adduced and as the court stated earlier, he who alleges must prove. This Court finds that the Respondents herein did not prove the element of trust to the required standard before the trial court.

ii. Who is the rightful owner of all the suit land and did the court appreciate the principles of Land Registration in determining ownership of the suit land?

The suit land herein ***LR.No.Loc.16/Kigoro/491,*** is registered in the name of the Appellant. It was registered so in ***1970,*** during the lifetime of their mother, ***Rahab Wanjiku***. Though the Respondents had alleged that the Appellant caused the said land to be registered in his name when their mother was sick, there was no evidence brought along by the Respondents that in ***1970,*** their mother had a memory loss. Infact it is evident that their mother died in ***1999,*** which was ***29 years*** after the transfer of the suit land to the Appellant. Further the Respondents made an allegation that the Appellant took advantage of the fact that he was a senior officer at Muranga County Council and fraudulently transferred the land to his name at the expense of his siblings. However as the Court stated earlier, fraud is a serious allegation which ought to have been strictly proved. The Respondents herein did not prove any allegations of fraud on the part of the Appellant.

The Appellant alleged that the suit land was given to him as a gift by their mother. Indeed the green card for the suit land shows that the land was registered in the name of the Appellant and consideration was a gift. There was no evidence availed by the Respondents to prove the contrary that this transfer and registration was not as a result of gift *inter-vivos* by their mother. The suit property being registered in the

name of the Appellant under Cap 300, then as provided by Section 27 of the said Registered Land Act, Cap 300 (now repealed), he is deemed to be the absolute owner together with all rights and privileges appurtenant thereto and this rights are not liable to be defeated except as provided by the Act. This position has been repeated in Sections 24, 25 and 26 of the ***Land Registration Act 2012***. ***Section 26(1)*** provides as follows:-

"The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

a. ***On the ground of fraud or misrepresentation to which the person is proved to be a party: or***

b. ***Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

This Court finds that the Respondents herein were not able to prove any of the grounds provided for by Section 26 (1) of the Land Registration Act 2012 to allow for challenge of the Appellant's title.

Therefore, this Court comes to a conclusion that the Appellant herein is the absolute and indefeasible owner of the suit property and therefore the rightful owner. He can only give shares of the parcel of land to the Respondents if he so wish. His rights cannot be defeated and the trial Magistrate was wrong in finding as he did.

iii. Was there fraud in registering the land in the name of the Appellant and was it proved as per the legal requirements?

Though the Respondents alleged that the Appellant caused the suit land to be transferred in his name through fraud, the said allegations were never substantiated. The Respondents (Plaintiffs) are the ones who alleged and therefore the onus of proof rested on them. As stated in ***Sarkar on Evidence 10th Edition Page 441;-***

> ***'Fraud which must be proved in order to invalidate the title of a registered purchaser for value is actual fraud not constructive or equitable fraud'***.

The Appellant herein alleged that he was given the suit land by their mother in ***1970***. The Respondents did not question this acquisition until after so many years after such registration and death of their mother. It was only the initial registered owner who would have clarified whether she indeed transferred the land to the Appellant as a gift or the said transfer was done through fraud. In the case of ***Dhalla...Vs...Meralli (1995-1998) 2EA 84 (SCU)***, the Court held that:-

> ***"Fraud must be pleaded and strictly proved, the burden being heavier than on a balance of probabilities generally applied in Civil matters".***

It is also trite that the person alleging fraud has the burden of proving it and the burden is a strict one and heavier than the balance of preponderance of probabilities.

This Court having considered and evaluated the evidence that was presented to the trial Magistrate finds that the said burden was not discharged by the Respondents and the trial court therefore arrived at a wrong finding.

iv. Was the suit time barred

The suit land herein was registered in the name of the Appellant in ***1970,*** as is evident from the copy of the Green Card. ***Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya*** provides as follows:-

> ***"an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claim to that person".***

It is clear that this action which is for recovery of land was brought to court after a period of ***12 years*** from the date on which the alleged right of action accrued. The Respondents did not obtain the requisite leave to file suit out of time. Given that the Appellant's title was registered in his name in ***1970*** and the Respondents suit was filed in the ***year 2010***, and the alleged right of action accrued in ***1970***, then the Court finds that the Respondents suit was time barred under the Limitation of Actions Act Cap 22, Laws of Kenya.

v. Did the Court have competent jurisdiction to entertain the suit?

The Appellant has questioned the pecuniary jurisdiction of the trial Court. He has alleged that the value of the suit land exceeded the pecuniary jurisdiction as provided in the Magistrate's Court Cap 10. Since the suit land herein ***LR.No.Loc.16/Kigoro/491,*** was registered under cap 300, the Magistrate's had jurisdiction to try the matter if the value of the land did not exceed ***Kshs.500,000/=.*** Though he Appellant has alleged that the suit land herein is ***23.7 acres*** in size and situated in ***Ndakaini Thika***, then its value is far beyond ***Kshs.500,000/=.*** However no valuation of this suit land was availed by the Appellant (Defendant) and raised by him before the trial Magistrate. Even if the Appellant alleged that the issue of jurisdiction can be raised at any stage, it is always prudent to raise it as soon as the occasion arises.

The Appellant raised the issue of jurisdiction in the Defence but on the date of the hearing, he did not raise it up and so matter proceeded in his presence and consent. He cannot raise the issue of pecuniary jurisdiction now. See the case of ***Alvin Kamande Njenga...Vs...Gacheru (2016) eKLR***,

where the Court held that:-

> ***"Even where the jurisdiction is not raised that does not necessary confer jurisdiction on the court if it has none. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings, even on appeal though it is always prudent to raise it as soon as the occasion arises".***

Having now carefully considered and evaluated the available evidence before the trial Magistrate, the Court finds and holds that the Plaintiffs then (Respondents herein) did not discharge their onerus task of proving their case on the required standard of balance of probabilities. The Court finds that the trial Magistrate arrived at a wrong finding and as a result thereof, this Court allows the Appeal as lodged by the Appellant and proceeds to quash and set aside the Judgement and decree of the Subordinate Court issued on ***26th November 2014***, and all consequential orders arising therefrom with costs to the Appellant both at the Subordinate Court and for this Appeal.

The Appellant had stated in his evidence that ***LR.No.Loc.16/Kigoro/ 496*** was reserved for ***Jane Wangare*** the 2nd Respondent and he was willing to transfer the same to her. Further that he bought ***LR.No.Loc.2/ Kanderendu/1290,*** for ***Emmah Kabura Mwangi***, the 3rd Respondent herein. The Appellant should honour the said promise and transfer the said parcels of land to 2nd and 3rd Respondents who are his sisters. The 1st Respondent admitted that he was allocated ***LR.No.Loc.16/Kigoro/389,*** which was measuring ***16.5 acres,*** but he later sold it as it was barren land. This Court makes no any other finding on him.

For avoidance of doubt, the ***Thika CMCC.No.1187 of 2010 is hereby dismissed.***

It is so ordered.

Dated, signed **and** ***delivered*** **at** ***Thika*** **this 23rd day of** ***February*** **2018.**

L. GACHERU

JUDGE

In the presence of

Mr. Kangethe holding brief for Mr. Kamere for Appellant

Mr. Njoroge holding brief for Mr. Wandai for Respondents

Diana - Court clerk

Court – Judgement read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

23/2/2018